

DRAFT OF JULY 8, 2008

MEMORANDUM OF UNDERSTANDING AMONG THE U.S. ARMY CORPS OF ENGINEERS, CENTRAL VALLEY FLOOD PROTECTION BOARD AND THE DEPARTMENT OF WATER RESOURCES REGARDING THE PROCESS TO REVIEW CALIFORNIA'S EARLY IMPLEMENTATION PROJECTS UNDER 33 U.S.C. SECTION 408

THIS Memorandum of Understanding is entered into among the U.S. Army Corps of Engineers ("Corps"), the Central Valley Flood Protection Board ("Board"), and the Department of Water Resources ("DWR") of the State of California (Board and DWR are sometimes collectively referred to as "State") regarding the Corps' process for reviewing the State's Early Implementation Projects (EIPs) pursuant to 33 U.S.C. Section 408.

WHEREAS, the catastrophic destruction and loss of life induced by the 2005 flooding of New Orleans by Hurricane Katrina and the Mid-west flooding in June and July of 2008 demonstrated the fragility of levee systems and the tragedies that result when levees fail and cause deep flooding in urban areas.

WHEREAS, California has taken the lessons from Katrina to heart and has embarked on an unprecedented set of initiatives to reduce flood risks in California, particularly in the vulnerable areas in the Central Valley. These initiatives include Governor Schwarzenegger's statewide FloodSAFE California program, together with new legislation to address floodplain management, land use, and flood risk reduction measures. For the Central Valley, California is developing a strategic Central Valley Flood Protection Plan ("CVFPP"). This plan, mandated by law to be completed by July 1, 2012, will take a system-wide approach to reducing risk to people and property currently protected from flooding by the existing Sacramento River Flood Control Project (SRFCP) and the San Joaquin River Flood Control System (SJRFCs).

WHEREAS, the voters of California passed two bond measures that provide approximately \$4.9 billion over the next ten years for improvements to help achieve flood damage reduction. Much of the flood bond funds are directed towards repairing and improving levees, particularly State-federal levees located in urban areas in the Central Valley. While much of this money will be spent after 2012 on projects identified by, or consistent with, the CVFPP, there are urgently needed flood risk reduction projects that need to proceed before the completion of the CVFPP in 2012.

| WHEREAS, the State is seeking Corps participation in developing the CVFPP under the authority of the Sacramento-San Joaquin River Basins Comprehensive Study.

WHEREAS, The Central Valley Flood Protection Act (SB 5) conditionally allows DWR to implement improvements to the State Plan of Flood Control for urban areas before completion of the CVFPP and such projects will be subject to approval by the Board.

WHEREAS, all flood risk reduction projects in the Central Valley of California, whether sponsored by the State or by local agencies or other stakeholders, that are proceeding in advance of the CVFPP are known as Early Implementation Projects (EIPs).

WHEREAS, prior to construction of these EIPs, the Corps must first approve these projects. Some of the EIPs may be approved pursuant to 33 U.S.C. section 408.¹ Others of these EIPs may be approved pursuant to 33 C.F.R. Section 208.10 within authority previously delegated to the Corps' District Engineer. If the Corps is performing construction of an EIP, then 33 U.S.C. section 408 is not applicable.

WHEREAS, while it might be ideal to await the development and implementation of the CVFPP to assure complete integration of all improvements to the flood protection system serving the Central Valley, that ideal must be weighed against the urgent need to promptly implement flood protection improvements for certain areas of the Central Valley, including primarily urban areas, consistent with the historic and ongoing efforts of the Corps.

WHEREAS, for timely processing of the 33 U.S.C. section 408 applications and better understanding of the system-wide implications of each of

¹ 33 U.S.C. Sec. 408. provides as follows:

It shall not be lawful for any person or persons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece of plant, floating or otherwise, used in the construction of such work under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing such works: Provided, That the Secretary of the Army may, on the recommendation of the Chief of Engineers, grant permission for the temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest: Provided further, That the Secretary may, on the recommendation of the Chief of Engineers, grant permission for the alteration or permanent occupation or use of any of the aforementioned public works when in the judgment of the Secretary such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work.

the State's EIPs, the Corps desires information on what EIPs may be expected and when they can be expected to be submitted for approval under 33 U.S.C. section 408.

WHEREAS, the Parties desire to identify the key issues and provide a framework for addressing the relevant issues in a manner that should allow the State and the Corps to enjoy the flood damage reduction benefits of the EIPs without improperly transferring risk (hydraulic impacts) to other areas, and without prejudicing future options for implementing comprehensive flood management and ecosystem enhancement policies and improvements that could be incorporated in any updated versions of the SRFCP or SJRFCS.

NOW, THEREFORE THE PARTIES AGREE AS FOLLOWS:

1. The purpose of this MOU is to outline an approach that would be acceptable to the Corps, the State, and local flood control agencies for managing Corps approval of individual EIPs on both the SRFCP and the SJRFCS until such time as the State completes the Plan. A document entitled "Central Valley Flood Protection Plan, Framework for California's Early Implementation Projects and Section 408 Approval in California's Central Valley" (Central Valley Framework) has been prepared by the State to provide useful context and background for the Corps' consideration and possible approval of the EIPs to be considered under 33 U.S.C. section 408. The Parties agree that the Central Valley Framework is attached and hereby incorporated by reference for the purpose of providing this additional information from the State to the Corps beyond the detail provided in this MOU, and that the Corps has not necessarily endorsed or accepted the statements or conclusions contained therein. The State intends to continue to revise and update the Central Valley Framework as additional information is developed regarding the flood control system generally and the EIPs specifically and the Parties agree that the State may update the Central Valley Framework without amendment of this MOU.
2. As defined above, EIPs are projects that will proceed in advance of the completion of the CVFPP, while the CVFPP is being developed and until it is completed in 2012. EIPs consist of projects implemented and funded by the State, implemented by the other stakeholders but funded in whole or in part by the State, and projects both funded and implemented by other stakeholders.
3. In order to implement State-funded EIPs, DWR must make certain determinations, including that the EIP will reduce or avoid risk to human

life in one or more urban areas and that the EIP will not impair or impede future changes to regional flood protection or the CVFPP.

4. 33 U.S.C. section 408 requires that the Corps provide approval of alterations and modifications to the SRFCP and the SJRFCS before such alterations and modifications may be made by the State. Authority to approve certain alterations and modifications has been delegated to the District Engineer pursuant to 33 C.F.R. 208.10. Types of alterations and modifications that may be approved pursuant to 33 C.F.R. 208.10 include structures such as pump houses, garages and sheds; bank protection activities; stairs, pipes, roads, bike trails, sidewalks, fences, driveways, decks, docks, power poles, patios, and individual monitoring wells and piezometers. The Corps has informed the State that the Corps is currently developing additional guidance to clarify what other types of alterations and modifications, if any, may be approved pursuant to the delegated authority of 33 C.F.R. 208.10 and the State supports the prompt development of such guidance by the Corps.
5. The State has prepared and provided to the Corps a matrix of potential EIPs for which the Board may request that the Corps provides approval pursuant to 33 U.S.C. section 408, and a current version of that matrix is attached to the Central Valley Framework which is attached hereto. The matrix also contains information regarding each EIP known to the State at this time such as the expected dates when approval requests will be submitted to the Corps, the name and a description of the project, an explanation of the deficiency to be corrected, and other important information. It is the intention of the Parties for the State to periodically update this Matrix and provide the updated matrix to the Corps without the need to amend this MOU.
6. Representatives of the Parties have met to develop mutual agreement on how EIP-specific hydraulic analysis and cumulative hydraulic impact analysis should be conducted to assure compliance with all legal and regulatory guidance applicable to the State and the Corps, including risk and uncertainty. The methodology (Hydraulic Analysis Methodology) has been agreed to by the Parties and is attached to the Central Valley Framework. **[NOTE: agreement still pending]**
7. Requests for project changes pursuant to 33 U.S.C. section 408 shall be submitted to the Corps Sacramento District and shall be accompanied with all necessary supporting information as needed by the Corps to

complete its review as determined by the Corps' October 23, 2006 guidance, and any subsequent applicable guidance.

- a. The District shall provide immediate notice of the request to Division and Corps Headquarters.
 - b. Following satisfactory completion of statutory compliance requirements (e.g., NEPA, CWA, ESA, NHPA, etc) , a maximum of 60 days would be expected for the Corps to complete its review of the submitted documentation and reach a decision.
 - c. The Parties agree that EIP-specific hydraulic analysis and cumulative hydraulic impact analysis shall be conducted pursuant to the Hydraulic Analysis Methodology attached to the Central Valley Framework.
 - d. The Parties agree that EIP effects and cumulative effects (e.g., sensitive species, growth inducement, habitat or agricultural loss, etc) shall be analyzed, disclosed, and addressed in the project-level environmental analysis required under the National Environmental Policy Act for each EIP.
 - e. For all proposed alterations and modifications for which more than \$5 million in State funding is being provided, the State and local agencies shall provide for peer review of the proposed alterations and modifications to be approved by the Corps under 33 U.S.C. section 408 and for quality assurance during construction. The State will also fully engage and support the Sacramento District of the Corps to provide design review and quality assurance construction monitoring and inspection during construction.
8. While the Corps through execution of this MOU does not provide any approval of the CVFPP, the Corps does commit to continue to work together in collaboration with its project partners, the State and local agencies, to implement this MOU towards expediting urgently needed flood damage reduction projects to achieve improved public safety in the urbanized centers of the California Central Valley. To that end all levels of the Corps (including Headquarters, Division, and District) commit to:
- a. Continue collaboration with the Federal-State-local 408 Task Force towards developing and further streamlining the application, review,

and approval process requirements for 33 U.S.C. section 408 authorizations.

- b. During the continued development of 33 U.S.C. section 408 guidance consider the inclusion of checklists of requirements and suggested templates to better assure a consistent approach for documentation in such requests.
 - c. Consistent with governing law, participate and collaborate in the early phases of flood management project development by local governmental agencies in order to facilitate the early identification of information required for reviews; and, to help identify any potential issues that might arise in the approval process.
 - d. Consistent with governing law, participate in early reviews of local agency flood management project information in advance of the final 33 U.S.C. section 408 submission in order to facilitate the review and approval process.
 - e. Continue coordination, partnership, and collaboration with the State with the objective of a sustainable flood risk management system for California's Central Valley.
9. The Parties agree that if this MOU precedes national guidance on implementation of 33 U.S.C. section 408, that there may be a need for the Parties to agree to amendments to this MOU to conform with the national guidance. Alternatively, the parties may elect to agree that the MOU expires upon issuance of the national guidance. Should certain EIPs be proceeding consistent with the terms of this MOU, but the new national guidance would require a change in the manner in which the Corps would approve such EIP or a change in the materials required for consideration by the Corps for approval of the EIP or a change in the standards to be used by the Corps for consideration of approval of the EIP, the Corps agrees to "grandfather" such EIPs and to continue to operate under this MOU for those EIPs as long as there is no statutory or regulatory prohibition preventing such processing
10. This MOU may be amended by mutual consent and may be cancelled by either party upon 90 days written notice.

IN WITNESS WHEREOF, the Parties hereto enter into this MOU as of the last date set forth below.

U.S. ARMY CORPS OF ENGINEERS, SOUTH PACIFIC DIVISION

John R. McMahon
Brigadier General, U. S. Army
Commander

CALIFORNIA DEPARTMENT
OF WATER RESOURCES

Approved as to form:

Lester A. Snow
Director

David Sandino
General Counsel

CALIFORNIA CENTRAL VALLEY
FLOOD PROTECTION BOARD

Approved as to form:

Benjamin F. Carter
President

Virginia Cahill
Board Counsel